

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1242

PLEASANT RICHARD TALLY
(a/k/a DICK TALLY),

Petitioner,

versus

WILLIAM P. JOHNSON, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON AND
AUBREY GILBERT, IN OPPOSITION

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BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON
AND AUBREY GILBERT, IN OPPOSITION

Respondents, Aubrey W. Gilbert and William P. Johnson respectfully request that the Supreme Court of the United States deny the Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit and Civil Action No. 77-2339, rendered on December 8, 1977, petition for rehearing and suggestion for rehearing en banc de-

nied, January 6, 1978, affirming the Judgment of the United States District Court for the Northern District of Georgia, Civil Action No. 77-359A, dismissing plaintiff's claim for relief against these respondents on the grounds that Civil Rights actions under 42 U.S.C. 1983, may not be maintained against private attorneys participating in state court litigation.

OPINIONS BELOW

The judgment of affirmance of the United States Court of Appeals for the Fifth Circuit is attached to the Petition for Certiorari as filed by the petitioner and identified in petitioner's brief as Appendix A. Likewise the Order of the Fifth Circuit denying the petition for rehearing and the suggestion for rehearing en banc is attached to the Petition for Writ of Certiorari identified as Appendix B, pages 2a and 3a. In addition, petitioner attached to the Petition for Writ of Certiorari the decision of the United States District Court for the Northern District of Georgia identified in the Petition for Writ of Certiorari as Appendix C; as well as the Order denying the plaintiff's Motion to Alter or Amend the Judgment, identified as Appendix D in the Petition for Writ of Certiorari.

JURISDICTION

Respondents respectfully submit that while the petitioner is certainly entitled to apply for a Writ of Certiorari in the present matter, the present matter is not a proper case for the granting of a Petition for Writ of Certiorari. The petitioner's reliance on *Stump v. Sparkman*, Supreme Court 76-1750, is misplaced and,

in addition, petitioner has totally failed to deal with the well-established rule that private attorneys participating in state court litigation are not acting under color of state law for purposes of suit filed pursuant to 42 *United States Code* 1983. The elaboration on the position taken by respondents is reserved for the Argument and Citation portion of this brief.

FEDERAL STATUTES

Federal Statutes involved in the present matter are:

- 1) 42 *United States Code* 1983 (R-53) which provides:

"Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity or other proper proceedings for redress."

- 2) *Federal Rules of Civil Procedure*, Rule 12(b)(6), which provides:

"Rule 12. Defenses and Objections — When and How Presented By Pleading or Motion — Motion for Judgment on Pleadings

- (b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-

claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

STATEMENT OF THE CASE

(A) The Proceedings Below:

This action was originally filed in the United States District Court for the Northern District of Georgia under *Title 42 United States Code 1983*, the Civil Rights Act of 1871, on March 2, 1977, against William P. Johnson, Homer Williams and Aubrey W. Gilbert, alleging damage resulting from a fraudulent scheme allegedly perpetrated by the defendants (R-4). The respondents herein, William P. Johnson and Aubrey W. Gilbert, were named as a result of their representation as attorneys of the petitioner and his then wife in a divorce action in the Superior Court of Carroll County, Georgia. (R-4, et seq., 52, et seq.)

On March 28, 1977, the petitioner moved under Rule 15, 19, 20 and 21 to amend the original Complaint and to add as a party-defendant Judge Lamar H. Knight, the Judge in the State Court divorce action. On April 4, 1977, respondents herein, William P. Johnson and Aubrey W. Gilbert, answered the Amended Complaint, denying all the material allegations, alleging that petitioner's Complaint failed to state a claim upon which relief could be granted, and that the applicable

Statute of Limitations had expired. (R-61, et seq., 118, et seq.) These latter two defenses were also made the basis of a Motion to Dismiss petitioner's Complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. (R-66, 67 and 122) The respondents herein, William P. Johnson and Aubrey W. Gilbert, also filed briefs in support of the motions to dismiss. (R-68, et seq., and 123, et seq.)

On June 3, 1977, the United States District Court for the Northern District of Georgia, under authority of Rule 12(b) (6) of the *Federal Rules of Civil Procedure*, dismissed the petitioner's amended complaint as to all defendants, including the respondents herein, William P. Johnson and Aubrey W. Gilbert, for failure to state a claim upon which relief could be granted. (R-300) With regard to respondents, William P. Johnson and Aubrey W. Gilbert, the Court concluded:

"Defendants, Gilbert and Johnson, (appellees herein) acted as the attorneys for the respective parties in the Tally divorce action in 1969. Said defendants were participating in private, state court litigation, were not acting under any color of state law, and cannot be held liable under *42 United States Code 1983*.

Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974)"
(R-301)

The Court also rejected petitioner's contention asserting liability of the Judge and the attorneys on a theory of conspiracy contending that the Court was

without jurisdiction to hear the matter. The Court concluded:

"Despite plaintiff's claims to the contrary it is clear that Judge Knight had jurisdiction over the divorce proceedings in question and was empowered to make a disposition of plaintiff's shareholdings in Style Crest under *Georgia Code Annotated §30-203*." (R-300, 301)

On June 13, 1977, petitioner moved to alter and amend the Judgment of the District Court. On June 28, 1977, the Court denied petitioner's motion to alter or amend its Judgment. (R-345)

On December 8, 1977, a panel of the United States Court of Appeals for the Fifth Circuit decided per curiam that the dismissal of the petitioner's amended complaint by the United States District Court for the Northern District of Georgia under Rule 12(b)(6) of the *Federal Rules of Civil Procedure* should be affirmed, and that decision was affirmed.

On January 6, 1978, a panel of the United States Court of Appeals for the Fifth Circuit denied the petition for rehearing and denied the suggestion for rehearing en banc.

On March 10, 1978, the United States Court of Appeals for the Fifth Circuit entered an Order denying petitioner's motion for a further stay of the issuance of the mandate of the Fifth Circuit. A copy of that Order is attached and identified as Appendix A.

(B) The Statement of Facts:

The respondent herein, William P. Johnson, acting as a private attorney in state court litigation, represented the former wife of the petitioner herein in a 1969 Georgia divorce action. Respondent herein, Aubrey W. Gilbert, acting as a private attorney in state court litigation, represented the petitioner in that same 1969 Georgia divorce action. The petitioner commenced this action seeking to recover from these private attorneys, and others, under *Title 42 United States Code 1983*, alleging a conspiracy by which he was deprived of his ownership in a certain corporation and deprived of the ability to earn a living. (R-52, et seq.)

Petitioner does not contend, and has never contended, that the Superior Court of Carroll County, Georgia, did not have jurisdiction to entertain his divorce proceedings. Neither does the petitioner contend that the Court lacked personal jurisdiction over the petitioner, as evidenced by the Sheriff's Certificate of Service. (R-317) Rather, the petitioner makes the rather novel contention that the Superior Court of Carroll County was without jurisdiction to transfer his interests in a certain corporation to his wife, simply because the Court did not have personal jurisdiction over the remaining shareholders in the corporation, or the corporation itself. (R-52, et seq., and 5th Circuit Brief of Petitioner, pp. 6, 7 and 9).

Respondents, William P. Johnson and Aubrey W. Gilbert, will expect to demonstrate by this brief that the action of the United States District Court for the

Northern District of Georgia was proper since an action under *Title 42 United States Code 1983* cannot be maintained against private attorneys participating in state court litigation, and because the Judge of the Superior Court was acting within his jurisdiction when he transferred the interest of the petitioner in a certain corporation to the petitioner's wife.

QUESTIONS PRESENTED

I.

CAN PRIVATE ATTORNEYS PARTICIPATING IN STATE COURT LITIGATION BE HELD LIABLE UNDER THE PROVISIONS OF *TITLE 42 UNITED STATES CODE 1983*, AND WAS THE COURT BELOW CORRECT IN AFFIRMING THE GRANTING OF RESPONDENTS WILLIAM P. JOHNSON AND AUBREY W. GILBERT'S MOTIONS TO DISMISS PETITIONER'S COMPLAINT, PURSUANT TO RULE 12(b) (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

II.

CAN PRIVATE ATTORNEYS PARTICIPATING IN STATE COURT LITIGATION BE HELD LIABLE UNDER THE PROVISIONS OF *TITLE 42 UNITED STATES CODE 1983*, ON THE THEORY THAT THE JUDGE IN THE STATE COURT ACTION ACTED WITHOUT JURISDICTION, WHERE THE STATE COURT JUDGE CLEARLY HAD SUBJECT MATTER JURISDICTION AND IN PERSONAM JURISDICTION OVER THE INDIVIDUAL WHO IS THE PETITIONER IN THE PRESENT ACTION?

ARGUMENT AND CITATION OF AUTHORITY

I.

Can Private Attorneys Participating In State Court Litigation Be Held Liable Under The Provisions Of *Title 42 United States Code 1983*, And Was The Court Below Correct In Affirming The Granting Of Respondents, William P. Johnson And Aubrey W. Gilbert's Motion To Dismiss Petitioner's Complaint, Pursuant To Rule 12 (b) (6) Of The Federal Rules Of Civil Procedure?

An action cannot be maintained under *Title 42 United States Code 1983* against an attorney participating in private state court litigation. This action was brought against the respondents herein, and others, under *Title 42 United States Code 1983* alleging the violation of petitioner's civil rights. By its very terms, *42 U.S.C. 1983*, requires that a defendant in a suit pursuant to this provision must have been acting under color of statute or color of law. Specifically, *42 United States Code 1983*, provides:

"Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity or other proper proceedings for redress."

The courts have uniformly held that an attorney participating in private state court litigation is not acting under color of state law within the meaning of this statute and cannot be held liable under the provisions of this statute. In the Fifth Circuit case of *Hill v. McClellan*, 490 F. 2d 859 (5th Cir. 1974), that Court concluded:

"Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Act and are not liable under said act for their actions in such litigations. 42 United States Code 1983."

The cases are legion which support this proposition. In fact no case has been found which would allow such an action to be maintained against an attorney in this setting.

For a case strikingly similar to the present case, see *Dotlich v. Kane*, 497 F. 2d 390 (8th Cir. 1974). As in the present case, the Eighth Circuit in the *Dotlich* case, supra, was confronted with a suit filed under 42 United States Code 1983 and arising out of representation by the defendant, attorney, in a divorce proceeding in the state court. Also, like the present case, the Court had transferred the husband's interest in certain property to the wife. The Eighth Circuit concluded that the Court below acted properly in dismissing the attorney as a party and stated:

"An attorney who represented a wife in a divorce proceeding was not acting under color

of state law within the meaning of the Civil Rights Act and thus could not be subject to civil rights actions seeking injunctive, declaratory and monetary relief in regard to a court order in a divorce proceeding requiring the husband to transfer all title and interest in his and his wife's homestead to his wife. 42 United States Code 1981-1986."

Petitioner, however, contends that respondents, privately retained attorneys, conspired with defendant Judge Lamar H. Knight, to deprive him of certain property and liberty in violation of 42 United States Code 1983. Petitioner does not allege sinister meetings and a formal conspiratorial agreement; rather, he assumes the conspiracy from what he contends to have been an absence of jurisdiction on the part of the Court. However, as the Ninth Circuit indicated in the case of *Haldane v. Chagnon*, 345 F. 2d 601 (9th Cir. 1965):

"Attorneys who appeared in a divorce action and who were consulted by the Judge who then initiated proceedings to detain the husband for observation as to his mental health, have not acted in conspiracy with a state officer against whom the husband could state a valid claim and had not committed any wrongful acts which would subject them to liability under this section."

The complaint in the present matter reveals on its face that respondents, William P. Johnson and Aubrey W. Gilbert, were privately retained attorneys and con-

sequently this case is within the decision cited above and is not maintainable against these respondents under *Title 42 United States Code 1983*. For additional cases which reemphasize the propositions outlined above, see: *Kenney v. Fox*, 232 F. 2d 288 (1956), Cert. Denied, 352 U.S. 855; *Nelson v. Stratton*, 469 F. 2d 1155 (5th Cir. 1972), Cert. Denied, 410 U.S. 957; *Szijarto v. Legeman*, 466 F. 2d 864 (9th Cir. 1972); *Steward v. Meeker*, 459 F. 2d 669 (3rd Cir. 1972); *Meier v. State Farm Mutual Auto Insurance Company*, 356 F. 2d 504 (7th Cir. 1976), Cert. Denied, 385 U.S. 875.

The other cases which support the proposition identified above are too numerous to list and as previously stated, no case has been found contrary to this proposition. Also as indicated, petitioner's complaint revealed on its face that respondents William P. Johnson and Aubrey W. Gilbert were privately retained attorneys participating in private state court litigation. However, the same rule applies whether attorneys are retained or appointed. See: *Szijarto v. Legeman*, *supra*, and *Shelton v. Randolph*, 373 F. Supp. 448 (D.C. Va. 1974).

Indulging all inferences in favor of the petitioner, it is nonetheless abundantly clear that an action under *Title 42 United States Code 1983* cannot be sustained against respondents, William P. Johnson and Aubrey W. Gilbert, for the reasons stated above and consequently the Court below did not err in granting these respondents' Motions to Dismiss petitioner's complaint for failure to state a claim upon which relief could be granted.

II.

Can Private Attorneys Participating In State Court Litigation Be Held Liable Under The Provisions Of Title 42 United States Code 1983, On The Theory That The Judge In The State Court Action Acted Without Jurisdiction, Where The State Court Judge Clearly Had Subject Matter Jurisdiction And In Personam Jurisdiction Over The Individual Who Is The Petitioner In The Present Action?

In an attempt to circumvent the authority cited in the preceding portion of this brief, petitioner argues that the cases cited above do not apply where the state court was without jurisdiction as an initial matter. Petitioner makes a very unusual and respondents submit, unsupportable argument. Petitioner does not contend that the state court was without jurisdiction to entertain the divorce. Neither does petitioner contend that the court lacked personal jurisdiction over the petitioner. Rather, the petitioner contends that the state court lacked jurisdiction to order a transfer of his interest in the corporation to his wife because the state court did not have in personam jurisdiction over all other shareholders in the corporation and the corporation itself. (See Petitioner's Fifth Circuit Brief, pp. 6, 7 and 9)

The reasonable mind cannot question the presence of jurisdiction in the state court action. The Georgia Constitution as embodied in *Georgia Code Annotated* §2-3901, confers jurisdiction to hear divorce proceedings upon the superior courts in the state. That is not questioned by any party to this action. Moreover, the

superior court is awarded jurisdiction to make dispositions of property and awards of alimony in divorce proceedings. *Georgia Code Annotated §30-202*, provides:

"30-202. Proceedings to obtain temporary alimony. Whenever an action for divorce, at the instance of either party, or a suit by the wife for permanent alimony, shall be pending, the wife may, at any regular term of the court in which the same shall be pending, apply to the presiding judge, by petition, for an order granting to her temporary alimony pending the cause; and, after hearing both parties and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony including expenses of litigation, as the condition of the husband and the facts of the case may justify."

[See also: *Georgia Code Annotated §30-203*.]

Finally, the record itself establishes proper service and *in personam* jurisdiction over the petitioner for purposes of that state court divorce action. (R-317) Consequently, it is difficult to see how the state court lacked jurisdiction in the present case.

Counsel for the petitioner argues by analogy and insists that the action of the state court in Georgia was tantamount to transferring ownership and control of Ford Motor Company based only on *in personam* jurisdiction over Henry Ford in a divorce proceeding. Counsel's analogy is inappropriate. There is no authority, and counsel cites none, which would pre-

vent that divorce court from transferring Henry Ford's interests in the Ford Motor Company to his wife. In fact, that type of action by a state court would be sanctioned by the provisions cited above if the court had personal jurisdiction over Henry Ford, as it had over the petitioner in the present matter.

PETITIONER'S RELIANCE ON STUMP V. SPARKMAN, PRESENTLY BEFORE THIS COURT ON CERTIORARI.

The Seventh Circuit, in *Sparkman, supra*, found that the Indiana State Court Judge could not be judicially immune from liability under the Federal Civil Rights statutes where there was no statute authorizing the particular action taken by the state court judge. While this court has not, at this point, decided the validity of the Seventh Circuit decision, the facts of that case are vastly different from the facts in the present case, where the state court judge acted pursuant to a specific statute authorizing him to make dispositions of property in divorce actions. (See: *Georgia Code Annotated §30-202 and 30-203*.)

That the state court in the present matter had personal jurisdiction over the petitioner has not been questioned and the authority of that state court to award certain of petitioner's property as alimony cannot be seriously questioned. It is therefore abundantly clear that the state court in the divorce proceedings did act with proper jurisdiction, rendering petitioner's already tenuous argument totally inapplicable.

CONCLUSION

In summary, respondents William P. Johnson and Aubrey W. Gilbert, rely on the general rule as announced by the Fifth Circuit and in numerous other decisions cited in this brief, that private attorneys participating in private state court litigation do not act under the color of state law and cannot be held liable under 42 *United States Code* 1983. The petitioner attempts to create a theory by which these respondent attorneys would be derivatively liable based on a theory that the state court judge was acting without jurisdiction. As an initial matter, not a single case has been found which could even be remotely cited as authority for that proposition.

Secondly, petitioner does not contend that the state court in Georgia did not have jurisdiction to entertain divorce proceedings and, likewise, he does not contend that the court lacked personal jurisdiction over him. Rather, the petitioner contends that the court was without jurisdiction to order a transfer of his interests in the corporation simply because the court lacked jurisdiction over the remaining shareholders in the corporation and the corporation itself. This proposition is void of support in the law. Respondents, William P. Johnson and Aubrey W. Gilbert, have demonstrated that the state court of Georgia had jurisdiction to entertain the divorce proceedings, had personal jurisdiction over the petitioner herein and was authorized to transfer petitioner's interests in the corporation by decree of divorce.

For the foregoing reasons, respondents William P. Johnson and Aubrey W. Gilbert, respectfully request that the Petition for Writ of Certiorari be Denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2339

PLEASANT RICHARD TALLY,
a/k/a DICK TALLY,
Plaintiff-Appellant,

versus

WILLIAM P. JOHNSON, ET AL.,
Defendants-Appellees.

ORDER:

(X) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ PETER FAY
UNITED STATES CIRCUIT
JUDGE

[Filed: May 10, 1978]

CERTIFICATE OF SERVICE

I, Thomas E. Greer, Attorney for the Respondent herein, in the above entitled cause of action, do hereby certify that three copies of the above and foregoing brief ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON AND AUBREY GILBERT, IN OPPOSITION) has been forwarded to attorneys for all parties in this case, to-wit:

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This the ____ day of April, 1978.

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